



**Comments for the House Committee on Ways and Means  
Working Group on Pension and Retirement**

April 15, 2013

**Equal Treatment of Employer-Sponsored Pension Plans of Indian Tribal Governments.**

The Navajo Nation proposes an amendment of the Internal Revenue Code in order to (1) remove the “essential government function” and “commercial” activity tests that already do not apply to state and local plans and (2) confirm that pension plans may honor tribal court domestic relations orders that meet the same standards applied to state court orders.

**The Navajo Nation**

The Navajo Nation is a federally recognized Indian Tribe with its reservation located in portions of the states of Arizona, New Mexico, and Utah. The Navajo Nation government is comprised of a judicial branch, executive branch, and legislative branch. The Navajo Nation is comprised of approximately 300,000 enrolled members; approximately 210,000 members live on the Navajo Nation’s reservation lands. An additional 80,000 members live in immediately adjacent communities to the Navajo Nation.

The Navajo Nation imposes and administers gross receipts, possessory interest, business activity, fuel excise, oil and gas severance, tobacco products, hotel occupancy, and sales taxes within its territorial jurisdiction. The Navajo Nation government utilizes these tax revenues to fund a broad range of government activities, including economic development, community development, human resources, natural resources, public safety, health services, social services, education, legislative, and judicial services and functions within its governmental jurisdiction. Within the Navajo Nation, it is the Navajo Nation government that residents look to for the provision of governmental services.

The Navajo Nation government employs over 8,000 employees to provide governmental services. The Navajo government maintains both a defined benefit plan (with approximately 11,000 participants) and a defined contribution (with more than 8,000 participants) for employees of the government.

The Navajo Nation court system is the largest Indian court system in the United States and has been called the “flagship” of American tribal courts. The Navajo Nation Judicial Branch operates a two level court system made up of trial courts and the Navajo Nation Supreme Court. Currently, there are 12 district courts within the Navajo Nation. In fiscal 2011, the Navajo Nation courts handled approximately 59,000 cases.

**Elimination of “essential government function” and “commercial” activity tests**

The Navajo Nation contends that when determining what tribal plans qualify for “governmental status” under the Internal Revenue Code Section 414(d), tribes should be placed on par with state and local governments. This means that it should allow government treatment for revenue generating activities in the same manner as those performed by state and local governments. The commercial activities restriction should be read narrowly to limit only those activities that are engaged in for private rather than public interests.

Thus, terms can and should be construed in a manner to maximize government treatment and parity between tribes and states. For example, “essential government function” could be read to include any activity that is carried on to preserve or promote tribal self-determination, health, education and welfare, including the maintenance of culture and tradition. “Commercial activities” could read to prohibit only the activities that are carried on for private rather than public interests, and (for parity) not to exclude any revenue generating activity similar in scope, purpose or result to those carried on by state and local governments. This interpretation would be consistent with the rule that “statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit.” *See Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). Thus, the Internal Revenue Code would be amended to read in favor of government status wherever possible, with all doubt construed in favor of Indian tribes.

**Tribal Court Domestic Relation Orders.**

The Navajo Nation contends that pension plans should honor tribal court domestic relations orders that meet the same standards applied to state court orders. By amending the Internal Revenue Code, a local tribal family court would have the ability to resolve all the issues a resident Navajo spouse has when they file for divorce, marital property, child custody and support; amending the Code would provide swifter resolution of disputes, save families redundant legal fees and conserve judicial resources.

Under the current law, if a Navajo child resides within the New Mexico or Arizona portions of the reservation, their parent must file in tribal court to seek an initial custody order and state court to obtain a qualified domestic relation order for child support. Section 414(p)(1)(B) of the Internal Revenue Code defines a “domestic relations order” (“DRO”) as “any judgment, decree, or order, which relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and is made pursuant to a State domestic relations law (including a community property law).” Both Arizona and New Mexico have adopted their own version of the Uniform Child Custody Jurisdictional Enforcement Act (“UCCJEA”) which require it to be the “home state” of the child before it can issue an



initial child custody order. Both states require that a tribe must be treated “as if it were a state of the United States” for purposes of the statute's jurisdiction provisions. NMSA § 40-10A-104(b); *see* 25 A.R.S. §1001 *et seq.* (A court of this state shall treat a tribe as if it were a state of the United States for the purpose of applying this article [Arizona’s UCCJEA]”); *see also Garcia v. Gutierrez*, 2009-NMSC-044 (Holding that under NM’s UCCJEA, New Mexico district courts are bound to honor the decisions of tribal courts for continuing jurisdiction purposes, provided that the requirements of the UCCJEA have been met). Some States, such as Oregon, have adopted laws granting tribal courts the authority to issue DROs and recognize orders issued by such tribal courts. However, New Mexico and Arizona have not. As a result, a parent in this situation would have to file in both their local Navajo Family Court and state court to obtain custody and support for their child.

With regards to the DROs, the Navajo Nation proposes that Section 414(p)(1)(B) of the Internal Revenue Code be amended by inserting ‘or tribal’ after ‘State’. Additionally, Section 206(d)(3)(B)(ii)(II) of the Employee Retirement Income Security Act of 1974 would need to be amended by inserting ‘or tribal’ after ‘State’.

Thank you in advance for your consideration of these requests.

Sincerely,

Ben Shelly, President  
THE NAVAJO NATION